

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-6144

To be argued by
ROBERT S. GROBAN, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6144

WAN SHIH HSIEH,

Plaintiff-Appellant,

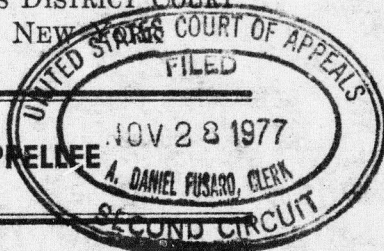
—v.—

MAURICE F. KILEY, District Director, Immigration
and Naturalization Service, United States Department of Justice,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE



ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for Defendant-Appellee.*

ROBERT S. GROBAN, JR.,
Special Assistant United States Attorney,
PATRICK H. BARTH,
*Assistant United States Attorney,
Of Counsel.*

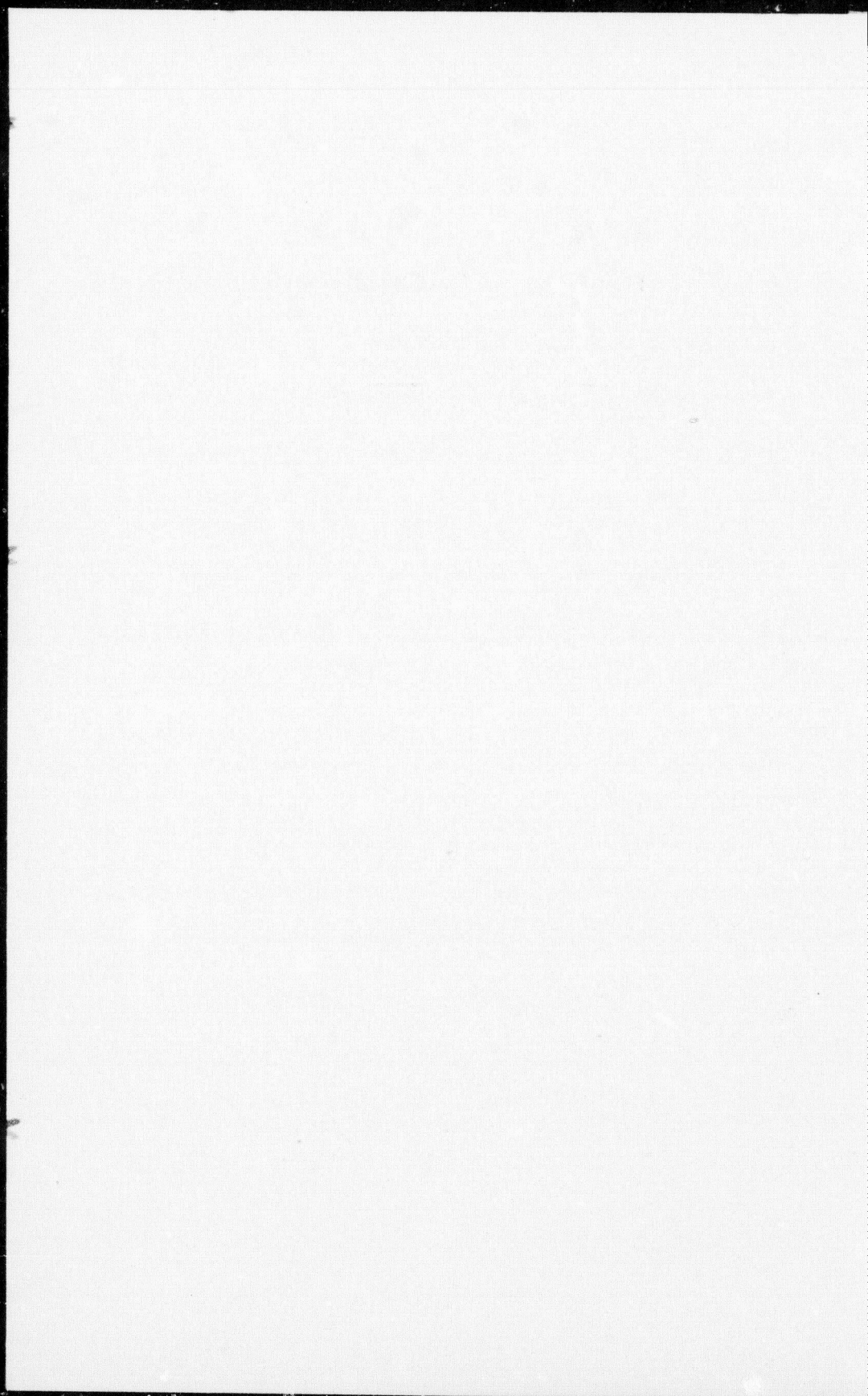


TABLE OF CONTENTS

	PAGE
Issue Presented	1
Nature of the Case	1
Statement of Facts	4
A. Hsieh's admission to permanent residence in the United States	4
B. Hsieh attempts to assist her children in ob- taining immigrant visas to the United States and, as a result, the American Con- sulate discovers that Hsieh may have ac- quired her permanent resident status through fraud	7
C. The Service commences an investigation, in a manner consistent with its investigatory priorities, to determine whether rescission proceedings should be instituted against Hsieh	9
D. Hsieh refuses to cooperate with the Ser- vice's investigation into her immigration status and then institutes this action to compel its completion	10

ARGUMENT:

The District Court Lacked Subject-Matter Ju- risdiction To Consider The Issues Raised By Hsieh's Complaint	14
A. The District Court misconstrued the nature of Hsieh's claim	15

	PAGE
B. The District Court correctly concluded that 28 U.S.C. § 1361 did not confer subject-matter jurisdiction upon the court to review the reasonableness of the Service's response to the Consulate's inquiry but incorrectly determined that the Service had an enforceable, peremptory duty to respond to such an inquiry	17
1. Hsieh is ineligible for equitable relief	18
2. Hsieh is ineligible for mandamus relief	19
a. There is no clear right to the relief sought in this case	20
b. The Service does not have a plainly defined and peremptory duty to conduct the investigation in question ..	21
c. The administrative remedies available to Hsieh are adequate	24
C. No jurisdictional basis exists upon which Hsieh's claim for judicial review can be predicted	26
1. 28 U.S.C. § 1331 did not confer subject-matter jurisdiction upon the District Court	26
2. Section 279 of the Act did not confer subject-matter jurisdiction upon the District Court	30
CONCLUSION	32

TABLE OF AUTHORITIES

Cases Cited:

<i>Acosta v. Gaffney</i> , 558 F.2d 1153 (3d Cir. 1971) ..	27
<i>A. H. Emery Co. v. Marcan Products Corp.</i> , 389 F.2d 11 (2d Cir.), <i>cert. denied</i> , 393 U.S. 835 (1968)	18
<i>American Amusement Co. v. Ludwig</i> , 82 F. Supp. 263 (D. Minn. 1949)	30
<i>Bedoya v. I.N.S.</i> , 410 F.2d 343 (9th Cir. 1969)	31
<i>Califano v. Sanders</i> , 430 U.S. 99 (1977) ..	17, 26, 27, 29
<i>Clune v. Publisher's Association of New York City</i> , 214 F. Supp. 520 (S.D.N.Y.), <i>aff'd on opinion</i> <i>below</i> , 314 F.2d 343 (2d Cir. 1963)	18
<i>Commonwealth of Puerto Rico v. Sealand Service,</i> <i>Inc.</i> , 349 F. Supp. 964 (D.P.R. 1970)	30
<i>Fiallo v. Bell</i> , 44 U.S.L.W. 4402 (1977)	7, 20
<i>Gomez v. Kissinger</i> , 534 F.2d 518 (2d Cir. 1976)	2, 21, 24, 31
<i>Hall v. DuPont de Nemour</i> , 312 F. Supp. 358 (1970)	29
<i>Harary v. Blumenthal</i> , Dkt. No. 76-6151 (2d Cir., May 19, 1977)	26
<i>Inmates of Attica Correctional Facility v. Rockefeller</i> , 477 F.2d 375 (2d Cir. 1973)	23
<i>In re: Wan Shih Hsieh v. Kiley, et ano.</i> (2d Cir., May 18, 1977)	14, 19
<i>Jacobson & Company, Inc. v. Armstrong Cork Co.</i> , 548 F.2d 438 (2d Cir. 1977)	18
<i>Johnson v. Robinson</i> , 405 U.S. 361 (1973)	26
<i>Kama Rippa Music, Inc. v. Schekeryk</i> , 510 F.2d 837 (2d Cir. 1975)	18
<i>Kliendienst v. Mandel</i> , 408 U.S. 753 (1971)	20

	PAGE
<i>Leonhard v. Mitchell</i> , 473 F.2d 709 (2d Cir.), <i>cert. denied sub nom. Leonhard v. Richardson</i> , 412 U.S. 949 (1973)	20
<i>Lovallo v. Froehlke</i> , 468 F.2d 340 (2d Cir.), <i>cert. denied</i> , 411 U.S. 918 (1972)	18, 19
<i>Open America v. Watergate Special Prosecution Force</i> , Dkt. No. 76-1371 (D.C. Cir., July 7, 1976)	20
<i>Pena v. Kissinger</i> , 409 F. Supp. 1182 (S.D.N.Y. 1976)	21, 31
<i>REA Express v. United States of America</i> , Dkt. No. 77-4278 (2d Cir., Sept. 16, 1977)	20
<i>Richardson v. United States</i> , 465 F.2d 844 (3d Cir. 1972), <i>rev'd on other grounds</i> , 418 U.S. 166 (1974)	17
<i>Schilling v. Rogers</i> , 363 U.S. 666 (1958)	17
<i>Sheldon v. Sill</i> , 49 U.S. 441 (1850)	26
<i>Skelly Oil Co. v. Phillips Petroleum Co.</i> , 339 U.S. 667 (1949)	17
<i>Small v. Kiley</i> , Dkt. No. 76-6162 (2d Cir., March 9, 1977)	17, 20
<i>Stern v. South Chester Tube Co.</i> , 390 U.S. 606 (1967)	17
<i>Ubiera v. Bell, et al.</i> , 77 Civ. 3820 (S.D.N.Y., filed August 5, 1977)	4
<i>United States v. Diogo</i> , 320 F.2d 898 (2d Cir. 1963)	7
<i>United States v. Olds</i> , 426 F.2d 562 (3d Cir. 1970)	17, 18
<i>United States v. Santelises</i> , 476 F.2d 787 (2d Cir. 1973)	22, 31

PAGE

<i>United States ex rel. London v. Phelps</i> , 22 F.2d 288 (2d Cir. 1927), <i>cert. denied</i> , 276 U.S. 630 (1928)	31
<i>United States ex rel. Masucci v. Follette</i> , 272 F. Supp. 563 (S.D.N.Y. 1967)	23, 31
<i>United States ex rel. Ulrich v. Kellogg</i> , 30 F.2d 984 (D.C. Cir.), <i>cert. denied</i> , 279 U.S. 868 (1929)	31
<i>Vaca v. Sipes</i> , 386 U.S. 171 (1967)	23
<i>Zaoutis v. Kiley</i> , 558 F.2d 1096 (2d Cir. 1977)	7, 10, 22, 31

CONSTITUTION AND STATUTES CITED

United States Constitution, Article III	26
Immigration and Nationality Act, 66 Stat. 163 (1952) <i>as amended</i> :	
Section 101(a)(15)(G)(v), 8 U.S.C. § 1101(a) (15)(G)(v)	4
Section 104, 8 U.S.C. § 1104	21, 31
Section 106(a), 8 U.S.C. § 1105a(a)	29
Section 106(b), 8 U.S.C. § 1105a(b)	29
Section 203(a)(1), 8 U.S.C. § 1153(a)(1) ...	7
Section 203(a)(2), 8 U.S.C. § 1153(a)(2) ...	2, 7
Section 203(a)(4), 8 U.S.C. § 1153(a)(4) ...	7
Section 203(a)(5), 8 U.S.C. § 1153(a)(5) ...	7
Section 203(a)(6), 8 U.S.C. § 1153(a)(6) ...	5
Section 203(a)(7), 8 U.S.C. § 1153(a)(7) ...	5
Section 203(a)(8), 8 U.S.C. § 1153(a)(8) ...	5
Section 214, 8 U.S.C. § 1184	4

	PAGE
Section 245, 8 U.S.C. § 1255	6, 22
Section 245(a), 8 U.S.C. § 1255(a)	6
Section 246, 8 U.S.C. § 1256	2, 21
Section 246(a), 8 U.S.C. § 1256(a)	2, 9, 10, 22 23, 30, 31
Section 279, 8 U.S.C. § 1329	26, 27, 29, 30, 31
8 U.S.C. § 164 (1940 ed.)	29
Immigration Act of 1917, 39 Stat. 874	28
Immigration Act of 1907, 34 Stat. 989	28
Immigration Act of 1891, 26 Stat. 1086	28
Administrative Procedure Act, 5 U.S.C.	
§ 701 <i>et seq.</i>	1, 22, 24
Administrative Procedure Act Sections 10(a) and	
10(e)(1), 5 U.S.C. §§ 702 and 706(1) ...	3, 15, 23
Declaratory Judgment Act, 28 U.S.C. § 2201 <i>et seq.</i>	1
Act of October 21, 1976, 90 Stat. 2721	27
28 U.S.C. § 1331	3, 26, 27, 29
28 U.S.C. § 1331(a)	15
Act of June 25, 1948, 62 Stat. 869	28
28 U.S.C. § 41 (1940 ed.)	28
Judicial Code of 1911, 36 Stat. 1167	28
28 U.S.C. § 1361	3, 15, 17, 21, 2, 24, 25

Regulations Cited:

8 C.F.R. § 204.1(a)	7
8 C.F.R. § 205	22
22 C.F.R. § 42.43	22
22 C.F.R. § 42.90	2

Other Authorities Cited:

Davis, <i>Administrative Law of the Seventies</i> , Section 28.08 (June, 1976)	23
Hart and Wechsler, <i>The Federal Courts and the Federal System</i> , 848 (2d Ed. 1973)	28
H.R. 9531, 95th Cong., 1st Sess. (1977)	9
S. 2252, 95th Cong., 1st Sess. (1977)	9
Letter from Attorney General Griffin B. Bell to the Speaker of the House of Representatives, October 7, 1977	9
H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 5 (1976) ..	27
Notes to the 1907 Immigration Act, Section 4277 ..	28
S. Rep. No. 94-996, 94th Cong., 2d Sess. 14 (1976) ..	27



**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-6144

WAN SHIH HSIEH,
Plaintiff-Appellant,
—v.—

MAURICE F. KILEY, District Director, Immigration and
Naturalization Service, United States Department
of Justice,
Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE

Issue Presented For Review

Did the District Court have subject-matter jurisdiction to consider the issues raised in Hsieh's complaint?

Nature of the Case

This action was commenced on August 27, 1976. The complaint asserted jurisdiction under both the Declaratory Judgment Act ("DJA")¹ and the Administrative Procedure Act ("APA")² and sought essentially one form of relief: an order requiring the Immigration and Natural-

¹ 28 U.S.C. § 2201 *et seq.*

² 5 U.S.C. § 701 *et seq.*

ization Service ("Service") to complete an investigation into whether rescission proceedings should be instituted against plaintiff Wan Shih Hsieh ("Hsieh") to rescind her permanent resident status pursuant to Section 246(a) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1256(a) (A. 13).³

The Service's investigation was commenced as a result of an inquiry from the American Consulate in Taiwan in which the Consulate informed the Service of its belief that Hsieh had acquired her immigration status through fraud and advised the Service that it would hold her children's visa applications in abeyance until the Consulate was notified of the Service's decision whether to institute rescission proceedings against Hsieh (A. 104).⁴

Subsequently issue was joined and, on May 18, 1977, the Service moved to dismiss Hsieh's action pursuant to

³ Numerical references preceded by the letter "A." refer to the Appendix previously filed with this Court.

⁴ Since the Consulate had reasonable grounds to believe that Hsieh had acquired her immigrant status through fraud (A. 101, 104) and both its authority to approve the children's visa applications as well as the children's eligibility to enter the United States as second preference immigrants depended on the viability of Hsieh's status, *see* Section 203(a)(2) of the Act, 8 U.S.C. § 1153(a)(2), the Consulate could have refused to issue the visas requested by the children on that basis, *see* 22 C.F.R. § 42.90, and such a decision clearly would not have been subject to judicial review. *Gomez v. Kissenger*, 534 F.2d 518, 519 (2d Cir. 1976). Instead, the Consulate decided to delay its adjudication of their visa applications pending an investigation by the Service into whether rescission proceedings should be instituted against Hsieh. This disposition took the burden of proof from the children and placed it on Hsieh who, by cooperating with the Service, could resolve the doubts surrounding her immigration status, facilitate her children's lawful entry into this country, and obviate the necessity for the commencement of formal rescission proceedings under Section 246 of the Act.

Rule 12(b)(6), Fed. R. Civ. P., contending that the District Court lacked subject-matter jurisdiction to resolve the issues raised in the complaint. On June 2, 1977 Hsieh cross-moved for summary judgment pursuant to Rule 56(a), Fed. R. Civ. P., contending that the Court had jurisdiction and that she was entitled to judgment as a matter of law (A. 53).

On August 29, 1977 the Honorable Lloyd F. MacMahon, United States District Court Judge for the Southern District of New York, filed a memorandum opinion which denied Hsieh's motion for summary judgment, granted the Service's motion to dismiss the complaint and ordered this action dismissed. In his decision, Judge MacMahon held that the Service had a duty under the Act to conduct an investigation into whether Hsieh's permanent resident status should be rescinded and to complete this investigation within a reasonable time. However, Judge MacMahon also found that the Service was proceeding with the investigation in a reasonable manner, consistent with its priorities for such investigations, and concluded that, as a result, the Court lacked subject-matter jurisdiction to order the investigation completed under either Sections 10(a) or (e)(1) of the APA, 5 U.S.C. §§ 702 and 706(1), and 28 U.S.C. § 1331 (a) or 28 U.S.C. § 1361. Hsieh filed her notice of appeal from the District Court's opinion and order on September 1, 1977.

It is the Service's position that the District Court's decision to dismiss this action because it lacked subject-matter jurisdiction was correct and should be affirmed by this Court. However, the Service also contends that the conclusions implicit in the District Court's decision, namely, that the Service had a duty under the Act both to investigate Hsieh's immigration status and to complete

the investigation within a reasonable time, were erroneous.⁵

Statement of Facts

Plaintiff-appellant Wan Shih Hsieh is a forty-six year old alien who is a native and citizen of Taiwan, Republic of China (A. 70). On September 20, 1966 Hsieh was first admitted to the United States on a non-immigrant visa as the employee of a United Nations official (*id.*).⁶ Her husband and three children did not accompany her and continued to reside in Taiwan (*id.*).

A. Hsieh's admission to permanent residence in the United States.

On January 3, 1973 Hsieh invested \$7,000 in the Hsin Hsin Chinese Restaurant in Brooklyn, New York and became a shareholder in the corporation owning that restaurant (A. 71, 86). One month later, on February 26, 1973, the Hsin Hsin Restaurant submitted an application in Hsieh's behalf to the United States Department

⁵ In this regard it is respectfully requested that this Court address the merits of the District Court's analysis in a written opinion. Such an opinion would be helpful for two reasons. First it would eliminate the possibility that unwarranted precedential value could be attached to the District Court's analysis which would exist if this Court merely affirmed the order appealed from pursuant to § 0.23 of the Rules of the United States of Appeals for the Second Circuit. Second, it would provide guidance for the disposition of similar cases pending in the Southern District of New York, *see, e.g., Ubiera v. Bell, et al.*, 77 Civ. 3820 (S.D.N.Y., filed August 5, 1977). This, in turn, could obviate the necessity for further appeals to this Court.

⁶ See Sections 101(a)(15)(G)(v) and 214 of the Act, 8 U.S.C. §§ 1101(a)(15)(G)(v) and 1184.

of Labor for employment as a cook at the restaurant (A. 84). Included with this application was an offer of employment from the Hsin Hsin Restaurant which stated that the restaurant had offered Hsieh a position as a chef on the basis of her purported five years experience in cooking Chinese food and dishes (A. 85) and a statement of Hsieh's qualifications in which Hsieh and her alleged prior employer swore that she had been employed as a chef in the Kwok Kong Restaurant in Taipei City, Taiwan from March, 1959 until August, 1965 and that, as a result of this experience, she was qualified to work as a specialty chef in the Hsin Hsin Restaurant (A. 87-90).

The labor certification for Hsieh's position as a specialty chef at the Hsin Hsin Restaurant was issued by the Department of Labor on April 11, 1973 (A. 83). Subsequently, on April 30, 1973, the restaurant filed a petition with the Service to qualify Hsieh as a sixth preference immigrant,⁷ based on her approved labor certification as a Chinese specialty cook, and to enable her to apply for permanent residence in the United States (A. 95-96). The petition was approved on August 9, 1973 (A. 94).

⁷ Section 203(a)(6) of the Act, 8 U.S.C. § 1153(a)(6). With limited exceptions not pertinent to this appeal, all aliens seeking to immigrate to the United States and work must obtain a certificate from the Secretary of Labor which indicates that there are insufficient workers available in this country to engage in the type of labor to be performed by the alien and that, as a result, the alien's employment would not adversely affect the domestic labor market. The approval of such a certificate qualifies the alien to apply for admission to the United States under Section 203(a)(6) as a "sixth preference" immigrant. The "preference" results because, under Section 203 of the Act, such an alien will be admitted to the United States before those aliens applying under Sections 203(a)(7) and (8) of the Act, 8 U.S.C. § 1153(a)(7) and (8).

As a result of the Hsin Hsin Restaurant's efforts in obtaining an approved labor certification and sixth preference petition for its new investor and shareholder, Hsieh was eligible to apply for adjustment of her non-immigrant status to that of a permanent resident pursuant to Section 245 of the Act, 8 U.S.C. § 1255.⁸ Accordingly, on August 24, 1973 Hsieh submitted an application for status as a permanent resident ("adjustment application") to the Service (A. 97-99). On November 9, 1973 Hsieh's adjustment application was approved and she was admitted to the United States as a permanent resident (A. 100).⁹

⁸ Section 245(a) of the Act, 8 U.S.C. § 1255(a), provides:

The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

⁹ Hsieh's adjustment application also sought permanent resident status under Section 245 of the Act for her children (A. 97). However, since the children were not in the United States, this relief was properly denied by the Service. See Section 245 (a) of the Act. In this action Hsieh also sought to challenge this decision (A. 2) but this challenge was specifically rejected by the District Court (A. 58). Hsieh's brief to this Court does not dispute the validity of the District Court's conclusion and, therefore, it will not be addressed in this brief.

- B. Hsieh attempts to assist her children in obtaining immigrant visas to the United States and, as a result, the American Consulate discovers that Hsieh may have acquired her permanent resident status through fraud.**

Upon receiving permanent resident status Hsieh immediately attempted to assist her children in Taiwan in obtaining immigrant visas to the United States¹⁰ by submitting petitions to the Service on her children's behalf to accord them second preference status under Section 203(a)(2) of the Act, 8 U.S.C. § 1153(a)(2) (A. 72).¹¹ Based on the Service's approval of these preference petitions on April 9, 1975, the children applied to the American Consulate in Taiwan for immigrant visas on July 15, 1975 (A 55, 72).

In processing the children's visa applications the Consul discovered that Hsieh's permanent resident status in

¹⁰ As Hsieh notes in her brief to this Court, the Act was designed to accommodate where possible, the unification of family members within the United States where citizenship or permanent resident status has been accorded to a family member and that status is not in doubt. This purpose was effectuated by granting a special preference status to certain aliens who share family relationships with such residents of the United States. See Sections 203 (a)(1)(2)(4) and (5) of the Act, 8 U.S.C. §§ 1153(a)(1)(2)(4) and (5); *Fiallo v. Bell*, 44 U.S.L.W. 4402, 4404 n.6 (1977).

¹¹ See 8 C.F.R. § 204.1(a). The petition procedure is the means by which relationships are verified by the Service for immigration purposes and preferential treatment under Section 203 of the Act. Cf. *United States v. Diogo*, 320 F.2d 898, 905 (2d Cir. 1963). Unfortunately such a procedure is necessary due to the potential for fraud inherent in the Act's preference scheme. See *Zaoutis v. Kiley*, 558 F.2d 1096, 1097-98 (2d Cir. 1977). It is this procedure which the District Court erroneously concluded was at issue in this case (A. 59-62). See subpoint A, *infra*.

the United States appeared questionable because her household register ¹² did not reflect the employment at the Kwok Kong Restaurant which she had claimed in both the applications for a labor certification (A. 87) and a sixth preference classification (A. 96) and in her adjustment application (A. 98). Since the approval of the children's visa applications as second preference immigrants depended on the validity of Hsieh's permanent resident status, the Consul suspended action on these applications and, by memorandum dated July 31, 1975, requested the Service to forward copies of Hsieh's adjustment application so that an investigation could be made into the manner in which she acquired her permanent resident status and a determination reached as to whether the children's visa applications should be approved (A. 72-73, 101).

On March 12, 1976, during the Consul's inquiry into Hsieh's immigration history, her oldest child, a twenty-five year old son, was interviewed at the American Consulate in Taipei, Taiwan. After the interview this son executed a sworn statement in Chinese in which he stated that his mother had never worked as a chef in Taiwan prior to her departure to the United States in 1966 and that, instead, she had worked as a pedicab driver, transporting children between their homes and school (A. 73, 102-03).

Based on the information acquired during his preliminary investigation, the Consul in Taiwan concluded that Hsieh had obtained her immigration status by fraud and could be the subject of rescission proceedings (A. 73,

¹² In Taiwan a household register is an official record, kept by both the central and local governments, which indicates, *inter alia*, the education, occupation and employment, spouse, and parents for each adult member of a household.

104). Consequently, by memorandum dated March 15, 1976, the Consul notified the Service of his conclusion and advised that no action would be taken on the children's visa applications until the Service informed the Consulate whether rescission proceedings would be instituted against Hsieh (*id.*).¹³

C. The Service commences an investigation, in a manner consistent with its investigatory priorities, to determine whether rescission proceedings should be instituted against Hsieh.

The American Consul's inquiry concerning Hsieh's immigration status was received by the Service on April 4, 1976 (A 73, 104). Due to the priority assigned to this type of investigation¹⁴ and the time remaining in the five-year statute of limitations concerning rescission pro-

¹³ Section 246(a) of the Act, 8 U.S.C. § 1256(a); See *Zaoutis v. Kiley*, *supra*.

¹⁴ All requests for investigation received by the Service are assigned a priority due to the number of investigations (A. 6). While Hsieh contends that the method for defining these priorities is "nowhere splayed [sic] on the record", (Hsieh's brief at page 12), the Service's procedure for establishing such priorities was clearly explained to the District Court in the affidavit of Dianne M. Weisheit, dated June 17, 1977 (A. 6-7). As Ms. Weisheit stated, the Service assigns a higher priority to those applications submitted by United States citizens or permanent residents on behalf of aliens already in the United States than it does to similar applications submitted in behalf of aliens outside the United States. This disparity is justified for several reasons. First, it permits the Service to concentrate its resources on locating and documenting the enormous number of illegal aliens already in the United States and thereby prepares the Service for any change in policy resulting from the possible enactment of pending legislation pertaining to the problems of undocumented aliens. See H.R. 9531, 95th Cong., 1st Sess. (1977); S. 2252, 95th Cong., 1st Sess. (1977); See also letter from Attorney General Griffin B. Bell to the Speaker of the House of Representatives, dated October 7, 1977, a copy of which will be furnished to this Court upon request. Second, if the applications for aliens within the

[Footnote continued on following page]

ceedings,¹⁵ Hsieh's case was forwarded to an investigator in May, 1976 (A 8).

D. Hsieh refuses to cooperate with the Service's investigation into her immigration status and then institutes this action to compel its completion.

After a preliminary investigation, the Service investigator assigned to Hsieh's case concluded that only Hsieh could provide the information, if it existed, necessary to refute the Consul's allegations (A. 10). On August 9, 1976, the investigator forwarded a letter to Hsieh and her then current attorney¹⁶ which asked her to contact the investigator to arrange a convenient time for an interview with respect to the visa petitions submitted by her children (A. 10, 18). Subsequently this interview was scheduled for August 25, 1976 (*id.*).

On August 25, 1976, Hsieh, accompanied by her current attorney, appeared at the Service's New York Office

United States are not adjudicated in a reasonable time, the alien beneficiaries may become subject to deportation proceedings. Finally, since aliens outside the United States have no absolute right to enter this country, they will not suffer substantial hardships if they are forced to wait additional time for the privilege of immigrating here. In this context Hsieh's contention in her brief that her application was assigned the wrong priority because *she* is currently in the United States is inapposite because the priority system obviously focuses on the residence of the beneficiary of the application, not the petitioner.

¹⁵ Since Hsieh's status was adjusted on November 9, 1973 (A. 100), the Service has until November 8, 1978 to institute rescission proceedings against her. See Section 246(a) of the Act, 8 U.S.C. § 1256(a); *Zaoutis v. Kiley*, *supra*.

¹⁶ Until Hsieh's appearance at this interview her attorney of record before the Service was Mr. Lee from Messrs. Pillerdorf, Nassy, Fuerstein and Lee (A. 10). While David C. Buxbaum, Esq., Hsieh's current attorney, may have represented her children at this time, he did not officially replace Mr. Lee as the attorney of record until he filed his notice of appearance (Form G-28) with the Service on August 25, 1976 (A. 19).

for her interview (A. 10, 20-21).¹⁷ Prior to the commencement of the interview, the Service investigator informed Hsieh's attorney that the interview was the result of certain information the Service had received which indicated that Hsieh had fraudulently acquired her permanent resident status and that its purpose was to take Hsieh's statement concerning her work experience in Taiwan and the United States (*id.*).

Once the Service investigator was confident that Hsieh understood the purpose of the interview as well as the Mandarin interpreter provided by the Service throughout the interview, the interview began (A. 11). Initially the investigator inquired with Hsieh about her work experience as a chef in Taiwan (*id.*). Hsieh responded by stating that, while she had learned to cook at the Kuo-Bin Restaurant in Taiwan, it was a training experience and not an actual job. When the Service investigator attempted to explore the distinction between training and actual employment, Hsieh's attorney, who also apparently speaks Chinese, began questioning the accuracy of the interpreter's translation of the Service investigator's questions. At this point the interview was adjourned at Hsieh's attorney's request, to enable him to speak with Hsieh (*id.*).

When Hsieh and her attorney had finished conferring, the interview resumed. Now in response to the investigator's questions, Hsieh stated that she had been employed as a chef at the Kuo-Bin Restaurant, and only the Kuo-Bin Restaurant, while in Taiwan (A. 11, 20-21).

¹⁷ The events which occurred during this interview are described on the affidavit of Ms. Weisheit at pages 4-15 of the appendix. We note here, however, that the handwritten inscriptions on the margins of that affidavit as well as other documents in the Appendix were not authorized, nor placed there, by any employee or representative of the defendant-appellee.

When confronted by the Service investigator with her labor certification application which indicated that she had allegedly worked for over six years in the Kwok-Kong Restaurant while in Taiwan, Hsieh responded that she had not mentioned this "other" employment because she didn't realize the investigator wanted to know (*id.*).

The investigator then inquired with Hsieh concerning her employment at the Kwok-Kong Restaurant. Hsieh was asked how long she had worked at that restaurant and the interpreter translated her answer to be "over a year". Hsieh's attorney immediately challenged this translation and suggested that the proper translation of Hsieh's answer should have been "approximately over a year". A similar interruption occurred when the Service investigator attempted to ask Hsieh who operated the Kwok-Kong Restaurant (*id.*).

After other instances in which Hsieh's attorney interrupted the interview by challenging the relevancy of the questions asked by the investigator, the investigator advised Hsieh's attorney that she would ask whatever questions she felt were relevant to her investigation and that, while he could not answer for his client, he could advise her not to answer if he felt that necessary or desirable (A. 12).

At this point in the interview the investigator asked Hsieh whether she had ever been a pedicab driver in Taiwan. Hsieh responded that she had (*id.*). However, immediately after Hsieh gave this answer, her attorney again interrupted the interview by challenging the relevancy of this question (*id.*). The investigator patiently explained to Hsieh's attorney that the Service had received information which indicated that Hsieh's work experience in Taiwan had consisted solely of driving a pedicab, not cooking in a restaurant as she had claimed,

and that, if true, this would preclude her children from obtaining immigrant visas and could result in the rescission of her permanent resident status (*id.*). Despite this explanation, Hsieh's attorney continued to disrupt the interview. Consequently, the investigator left the interview to contact her supervisor. When both returned to the interview room, Hsieh and her attorney had left (*id.*).

On August 26, 1976, the day following the Service's attempt to interview Hsien, Hsieh instituted this action claiming that the Service had unreasonably delayed its investigation into her immigration history (A. 1-3, 12). That same day Hsieh also obtained an order from the Honorable Inzer B. Wyatt, United States District Court Judge for the Southern District of New York, requiring the Service to show cause on September 3, 1976 why it should not be ordered "to report immediately to inquiries from the American Embassy in Taiwan regarding the application for permanent residence of [Hsieh's] children; respond to letters sent to [it] by [Hsieh's] attorney; cease [its] unreasonable and inordinate delaying of the application for permanent residence of [Hsieh's] children; and cease [its] harassment of [Hsieh]. . . ."

After the Service submitted papers in opposition to Hsieh's application (A. 69-109), a hearing was held before Judge Wyatt on September 3, 1977 to determine the validity of Hsieh's claims (A. 125). At the conclusion of this hearing, Judge Wyatt dismissed Hsieh's application finding, as Judge MacMahon later concluded, that Hsieh's allegations of unreasonable delay by the Service were "without merit" (*id.*).

For the next eight months Hsieh failed to take any action concerning this litigation (*id.*). Thereafter, after failing to comply with successive pre-trial orders issued by the District Court (A. 125-29) and then attempting to mandamus the District Court into giving her addi-

tional time in which to prosecute this action (A. 127),¹⁸ Hsieh refused to cooperate with several attempts by the Service to complete her interview and conclude that the investigation into her immigration status would have to wait because, as her attorney stated in writing "This case is now pending before the U.S. District Court, Southern District of New York" (A. 14, 27-28, 143-45).

ARGUMENT

The District Court Lacked Subject-Matter Jurisdiction To Consider The Issues Raised By Hsieh's Complaint.

In its opinion dismissing this action the District Court found, with ample support in the record, that the Service was proceeding in a responsible manner on the Consul's inquiry concerning whether rescission proceedings would be instituted against Hsieh and, as a result, concluded that it lacked subject-matter jurisdiction¹⁹ to order a

¹⁸ *Hsieh v. McMahon* (sic), Dkt. No. 77-3032. The petition for a writ of mandamus was denied by order of this court *sub nom.* *In re: Wan Shih Hsieh v. Kiley, et ano.* (2d Cir., May 18, 1977).

¹⁹ In her brief Hsieh assumes that the District Court granted summary judgment to the Service (*see, e.g.*, Hsieh's Brief at 1, 5-7) and proceeds to analyze and challenge the Court's conclusion on that basis. However, even a cursory reading of the District Court's decision reveals that it dismissed this action pursuant to Rule 12(b)(1), Fed. R. Civ. P., for lack of subject-matter jurisdiction (A. 54, 65). Consequently, much of what is asserted in Hsieh's brief is irrelevant to this appeal and need not be addressed here. Perhaps this fundamental misconception also explains why, instead of submitting to an additional interview with the Service and voluntarily putting an end to the alleged "delay" in this matter, Hsieh has steadfastly refused to cooperate with the Service and decided to prosecute this appeal. Should this be the case, the Service again extends an invitation to Hsieh to arrange an interview to resolve the doubts surrounding her initial acquisition of permanent resident status in 1973.

response to this inquiry under either Sections 10(a) and 10(e) (1) of the APA, 5 U.S.C. §§ 702 and 706(1), and 28 U.S.C. § 1331(a) or 28 U.S.C. § 1361.²⁰ Unfortunately, implicit in this correct conclusion was also the District Court's determination that the Service had a duty, cognizable under both the Act and the applicable regulations and enforceable under either 28 U.S.C. § 1361 or the APA, to respond to such consular inquiries and to do so within a reasonable time (A. 59-62). This conclusion, the Service contends, was clear error because a review of the nature of Hsieh's claim in relation to both the Act and its applicable regulations and the jurisdictional provisions on which both the District Court and Hsieh relied will demonstrate that the Service had no duty to respond to the type of Consular inquiry presented in this case and that, as a result, the District Court should have concluded that it lacked subject-matter jurisdiction to review any aspect of the Service's conduct in the case.

A. The District Court misconstrued the nature of Hsieh's claim.

Essential to a proper resolution of the jurisdictional claims presented by this appeal is a correct understanding of the claim made by Hsieh in her complaint. In this regard the District Court concluded that the Service's responsibility under the Act to adjudicate preference petitions submitted by aliens, like Hsieh, who seek to use

²⁰ Hsieh's complaint also requested the District Court to declare her children eligible for adjustment of status, to order their status adjusted, and to enjoin the Service from "harassing" her (A. 2-3). The District Court's opinion addressed each of these claims and dismissed them. Since the dismissal of these claims has not been challenged in this appeal, the Service has assumed that Hsieh has acceded to the District Court's decision in these areas and has not discussed them in its brief.

their family relationships with intending immigrants to assist them in obtaining visas to the United States²¹ implied an obligation on the Service's part to complete its investigation into the validity of these claimed relationships within a reasonable time (A. 61). Otherwise, the District Court found, the aliens will be left in an "administrative limbo" because the "visas cannot be obtained until the *preference petitions* are approved, and the *preference petitions* will not be approved until the investigation is completed." (emphasis added) (*id.*).

The District Court's extensive discussion of the provisions in both the Act and the applicable regulations relating to the process of adjudicating and revoking preference petitions (A. 59-62) and its total reliance on those provisions to ascribe a duty to the Service to complete the inquiry involved in this action (A. 62) manifests the District Court's misconception of Hsieh's claim. The inquiry which Hsieh wants completed has nothing to do with the preference petitions she submitted to the Service on behalf of her children. Those petitions were approved by the Service on April 9, 1975 and their continued validity is not at issue in this case.²² Rather, this action represents Hsieh's attempt to mandate an immediate response from the Service to the Consulate's inquiry as to whether rescission proceedings will be instituted against Hsieh to revoke her permanent resident status. In this

²¹See footnote 11, *supra*.

²² The limited purpose and significance of the preference petition procedure cannot be overemphasized. As discussed above in footnote 11, the preference procedure merely certifies claimed family relationships for immigration purposes so that the Service can reduce the potential for fraud inherent in the preference scheme and the alien can utilize the approved family relationship to obtain preferential admission to the United States. Since the Service has never asserted that Hsieh's children are not in fact her children, the validity of the preference petition certifying this relationship is not at issue here.

context, as we shall demonstrate, the Service clearly has no duty, under either the Act or the regulations, to respond to such an inquiry and the District Court lacked subject-matter jurisdiction to review any aspect of the Service's conduct in this matter.

- B. The District Court correctly concluded that 28 U.S.C. § 1361 did not confer subject-matter jurisdiction upon the court to review the reasonableness of the Service's response to the Consulate's inquiry but incorrectly determined that the Service had an enforceable, peremptory duty to respond to such an inquiry.**

Although not recited in her complaint,²³ in both the District Court and this Court Hsieh has asserted subject-matter jurisdiction under 28 U.S.C. § 1361 to support her request for an order compelling the Service to complete its investigation into her immigration status. However the relief afforded by 28 U.S.C. § 1361 is equitable in nature, *United States v. Olds*, 426 F.2d 562, 565-66 (3d Cir. 1970) and equivalent to the issuance of a mandatory injunction. *Stern v. South Chester Tube Co.*, 390 U.S. 606, 609 (1967); *Richardson v. United States*, 465 F.2d 844, 849-55 (3d Cir. 1972), *reversed on other grounds*, 418 U.S. 166 (1974). Consequently, the requirements for

²³ Hsieh's complaint asserts jurisdiction solely under the Declaratory Judgment Act and the Administrative Procedure Act. However, it is axiomatic that the DJA is a remedial statute, not a jurisdictional one, and cannot be invoked against the United States or its agents until subject-matter jurisdiction has been acquired under a specific statutory jurisdictional grant. *Schilling v. Rogers*, 363 U.S. 666, 671 (1958); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1949). Similarly, the APA is "not to be interpreted as an implied grant of subject matter jurisdiction" and cannot support this action. *Califano v. Sanders*, 430 U.S. 99, 105 (1977); *Small v. Kiley*, Dkt. No. 76-6162, slip op. 2221, 2224 n. 1 (2d Cir., March 9, 1977).

mandatory relief under that section are even more stringent than the strict requirements surrounding the issuance of a prohibitory injunction. *Jackson & Company, Inc. v. Armstrong Cork Co.*, 548 F.2d 458, 441 (2d Cir. 1977); *Clune v. Publishers' Association of New York City*, 214 F. Supp. 520, 531 (S.D.N.Y.), *aff'd on the opinion below*, 314 F.2d 343 (2d Cir. 1963). To establish a legal right to such a rare form of equitable relief, the party "seeking equity" must not only "do equity", a condition precedent to the issuance of any equitable relief, *Kama Rippa Music, Inc. v. Schekeryk*, 510 F.2d 837, 844 (2d Cir. 1975); *United States v. Olds*, *supra*, but also must demonstrate his eligibility for the relief as well as the irreparable harm that will occur should the mandatory injunction not issue. *Lovallo v. Froehlke*, 468 F.2d 340 (2d Cir.), *cert. denied*, 411 U.S. 918 (1972). Hsieh has failed to satisfy any of these criteria.

1. Hsieh is ineligible for equitable relief.

Individuals seeking the aid of a court of equity must "do equity" to obtain relief. *A. H. Emery Co. v. Marcan Products Corp.*, 389 F.2d 11, 17-18 (2d Cir.), *cert. denied*, 393 U.S. 835 (1968). This Court has recently noted its "repugnance for petitioners beseeeking its aid with 'unclean hands'." *Kama Rippa Music, Inc. v. Schekeryk*, 510 F.2d at 844. In this context Hsieh's conduct in this action clearly disqualifies her from any form of equitable relief.

While alluding to the harm to herself and her children which the Service's failure to complete its investigation is allegedly causing (*see* Hsieh's Memorandum in Support of the Summary Judgment Motion at page 18), she has utilized every opportunity to delay this litigation as well as the underlying administrative investigation. Thus, Hsieh's continued refusal to continue her interview until

this litigation concludes remains the *sole* obstacle to the Service's failure to respond to the Consulate's request.²⁴

Similarly, after deliberately ignoring the discovery provisions of the District Court's pretrial orders, Hsieh twice moved to delay the resolution of this action, once by an order to show cause (which the District Court characterized as another dilatory tactic) and once by attempting to mandamus the District Court (*see Hsieh v. McMahon* (sic), Docket No. 77-3032) with respect to discovery questions which should have been resolved long ago. Clearly this conduct does not constitute the type of "clean hands" envisioned by this Court in *Schekeryk* and precludes this Court from granting Hsieh's application on that basis.

2. Hsieh is ineligible for mandamus relief.

In *Lovallo v. Froehlke*, this Court defined the requirements for a writ of mandamus as follows:

"Generally speaking before the writ of mandamus may properly issue three elements must co-exist: (1) a clear right in the plaintiff to the relief sought; (2) a plainly defined and peremptory duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available [citations omitted]." *Lovallo v. Froehlke*, 468 F.2d at 343.

²⁴ In her affidavit in opposition to the motion for summary judgment, the Service's investigator noted that once Hsieh agreed to cooperate and participate in an interview, the investigation into the alleged fraudulent manner in which Hsieh acquired her immigration status could be completed in less than two months (A. 14). Ironically, had Hsieh chosen to cooperate instead of prosecuting this appeal, the investigation she seeks this Court to compel would probably have been completed.

Assuming Hsieh's conduct does not preclude the issuance of such an extraordinary equitable remedy, it is still clear that she has not demonstrated the existence of any of the elements necessary to support a writ of mandamus under *Lovullo* or that the Service's conduct in this case has "gone so far beyond any rational exercise of discretion as to call for mandamus" *Leonhard v. Mitchell*, 473 F.2d 709, 713 (2d Cir.), *cert. denied sub nom. Leonhard v. Richardson*, 412 U.S. 949 (1973).

a) There is no clear right to the relief sought in this case.

It is undisputed that Hsieh has no clear right to the relief ultimately sought by this action, the admission of her children to this country. As unadmitted and non-resident aliens, those children have no right to enter this country and Hsieh has no right to compel their admission. *Fiallo v. Bell*, 44 U.S.L.W. at 4404-05; *Kliendienst v. Mandel*, 408 U.S. 753, 763, 765-67 (1971). Moreover, even assuming the Service has a duty to investigate Hsieh's immigration status, as the District Court concluded, it is apparent that Hsieh has no right to have the Service complete her investigation prior to those which were requested earlier or were assigned higher priority ratings. *Small v. Kiley*, *supra* at 2226 n.3; *Open America v. Watergate Special Prosecution Force*, Dkt. No. 76-1371 (D.C. Cir., July 7, 1976); *See REA Express v. United States of America*, Dkt. No. 77-4278, slip op. 5989, 6007 (2d Cir., Sept. 16, 1977). Consequently, the District Court should have dismissed Hsieh's complaint on that basis.

b) The Service does not have a plainly defined and peremptory duty to conduct the investigation in question.

Although the District Court reached a contrary conclusion, it is clear that Hsieh's action under 28 U.S.C. § 1361 cannot succeed because she cannot demonstrate a plainly defined and peremptory duty on the Service's part to participate in the consular visa issuing process under Section 104 of the Act, 8 U.S.C. § 1104.

The District Court's memorandum decision misconstrued the nature of Hsieh's claim in this action and, without reference to any relevant statute or regulation, erroneously concluded that the Service's responsibility under the Act to approve *preference petitions* somehow implied a similar obligation on the Service's part to respond within a reasonable time to *consular inquiries*, such as presented in this case, which relate solely to whether the Service intends to institute rescission proceedings against a permanent resident alien pursuant to Section 246 of the Act, 8 U.S.C. § 1256. Under both the Act and the applicable regulations, it is clear that once the Service approves a preference petition (as it did in this case on April 9, 1975) its responsibility in the visa issuing process ends and the authority to investigate and adjudicate visa applications submitted by aliens in foreign countries rests solely with the State Department pursuant to Section 104 of the Act, 8 U.S.C. § 1104.²⁵

²⁵ The State Department was not named as a defendant in this action. Apparently, this omission manifested Hsieh's awareness that the District Court lacked subject-matter jurisdiction to compel the Consulate in Taiwan to issue visas to her children or to review the Consulate's decision to refuse to issue these visas. *Gomez v. Kissinger*, 534 F.2d at 519; *Pena v. Kissinger*, 409 F. Supp. 1182, 1186-88 (S.D.N.Y. 1976); see Hsieh's Brief at 16.

In this context the District Court's reliance on 22 C.F.R. § 42.43 and 8 C.F.R. § 205 as authority for the Service's involvement in the visa issuing process is completely misplaced. In substance, those provisions merely define the duties of the Service and the Consul with respect to the approval and effect of *preference petitions* and permit the Consul to return an approved *preference petition* to the Service for further review where he suspects that the family relationships claimed in the petition do not exist or were obtained fraudulently or that the preference petition may be subject to revocation pursuant to 8 C.F.R. § 205. Since the Service's investigation in this case obviously does not concern the validity of the children's *preference petitions* but rather focuses on the allegedly fraudulent manner in which *Hsieh* acquired her immigration status in 1973, it is clear that the District Court's conclusions in this regard must be erroneous.

There are also significant policy reasons inherent in the provisions of the Act for rejecting the District Court's determination that the Service has an implied responsibility to respond to a consular inquiry such as presented in this case. As we have discussed, Congress has specifically given the Service five years from the date on which an alien's permanent resident status was acquired under Section 245 of the Act, 3 U.S.C. § 1255, to investigate allegations of fraud and to institute rescission proceedings if those allegations can be substantiated. Section 246(a) of the Act, 8 U.S.C. § 1256(a); *Zaoutis v. Kiley*, *supra*. Moreover, the determination whether to institute such proceedings is totally discretionary and non-reviewable under either the APA,²⁶ or 28 U.S.C. § 1361. Con-

²⁶ The discretionary determination involved here, whether rescission proceedings should be instituted against *Hsieh*, like the decisions to institute deportation proceedings against an alien, see *United States v. Santelises*, 476 F.2d 787, 790 (2d Cir. 1973);

[Footnote continued on following page]

sequently, it is incorrect to conclude, as the District Court did, that, simply because relatives of an alien subject to rescission proceedings apply for admission to the United States, the Service's time within which to institute such proceedings is arbitrarily shortened, eliminated, or made the proper subject for judicial review. Such a conclusion would not only conflict with the express intentions of Congress in Section 246(a) but also would enable aliens properly the subject of rescission proceedings, such as Hsieh, to foreclose the Service's investigation into their immigration history simply by persuading relatives to apply for admission to the United States and then mandamus the Service to complete its investigation into their status. Clearly this type of conduct is not to be encouraged.

Similarly, the District Court's decision also potentially opens up the entire consular process for adjudicating visa applications to judicial review and discourages cooperation between the Service and the State Department in cases of this type. As we have indicated there are no provisions of the Act or the regulations promulgated thereunder (and neither Hsieh nor the District Court have referred to any) which create a specifically defined duty on the Service's part to conduct investigations for Con-

United States ex rel. Mascucci v. Follette, 272 F. Supp. 563, 565 (S.D.N.Y. 1967), or to investigate, arrest or prosecute individuals for criminal offenses, *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379-82 (2d Cir. 1973), is precisely the type of decision that courts have found to be non-reviewable under section 701(a)(2). See, Davis, "Administrative Law of the Seventies," Section 28.08 (June, 1976). Consequently, it can not be the subject of an order pursuant to Section 10(e)(1) of the APA, 5 U.S.C. § 706(1), and the District Court's conclusion to the contrary was clear error (A. 64). *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Inmates of Attica Correctional Facility v. Rockefeller*, *supra*.

suls into a permanent resident alien's status much less to complete such investigation in less time than that which Congress has authorized for domestic inquiries into the same subject matter. And, contrary to the District Court's decision (A. 64), simply because a Consul requests the Service to investigate whether rescission proceedings should be instituted against an alien and the Service voluntarily accedes to such a request, can not establish a duty on the Service's part, enforceable under either the APA or 28 U.S.C. § 1361. Such a conclusion would discourage any Service response to such inquiries and, in the long run, frustrate the completion of the type of investigation sought to be mandamus'd by Hsieh in this action.

Finally, the District Court's conclusion that the Service has a duty to respond to consular inquiries could also lead to extensive litigation involving the admission of aliens to the United States as the aliens and their petitioners seek to review the manner and results of these investigations. Since this is just the kind of "judicial interference" in the visa issuing process which this Court recently rejected in *Gomez v. Kissinger*, 534 F.2d at 519, it is clear that the District Court's conclusion in this regard must be modified.

c) The administrative remedies available to Hsieh are adequate.

As the history of this action illustrates, Hsieh cannot demonstrate either that this action is necessary because no alternatives to it are available or that irreparable harm will result if an injunction is not issued. In this regard the total absence of proof as to alternatives to this action is not surprising because such a discussion would inevitably focus on Hsieh's repeated refusals to cooperate with the Service's investigation or to respond

to the Service's call in letters and this would severely undercut her claim that the Service was responsible for the delays in her investigation. Similarly, the complete absence of proof in the record concerning the irreparable harm to Hsieh as a result of this delay can also be explained by her behavior in this litigation which the District Court so aptly characterized as "dilatory". To date Hsieh's only efforts in this action have been those which will delay its resolution. Even this appeal must be considered to have been made for a dilatory purpose in light of the absence of relevant authorities submitted and the fact that the Service's failure to complete Hsieh's investigation is attributable *solely* to her refusal to cooperate.

Finally, assuming *arguendo* that the Service has a duty, enforceable under 28 U.S.C. § 1361, to respond to a consular inquiry asking whether rescission proceedings will be instituted against a permanent resident alien, nevertheless it is clear, as the District Court correctly found, that the Service's conduct in its investigation has failed to go "far beyond any rational exercise of discretion" and that, as a result, the court lacked subject-matter jurisdiction to issue a mandatory injunction and properly dismissed the action.

The District Court found that the Service "is conducting the investigation as rapidly as possible considering the low priority given to such investigations and the other prior investigative responsibilities of the [Service]." (A. 65). Despite the obvious propriety of this conclusion Hsieh has continued to pursue this action, rather than cooperate with the Service's efforts to complete its investigation, and it is *her* conduct which remains solely responsible for the continued delays in this matter. Given the record already compiled by the Service concerning Hsieh's status, her efforts in this regard can be appre-

ciated. However, as the District Court correctly concluded, they preclude a finding of abuse of discretion on the Service's part and mandate the dismissal of this action.

C. No jurisdictional basis exists upon which Hsieh's claim for judicial review can be predicated.

It is axiomatic that, as statutory courts created by Congress under Article III of the Constitution, the federal district courts "can have no jurisdiction but such as the statute confers." *Sheldon v. Sill*, 49 U.S. 441, 449 (1850). Consequently, while it may not be necessary for Hsieh to refer specifically to the jurisdictional statute upon which she relies if her complaint pleads facts from which federal jurisdiction can be inferred, see *Harary v. Blumenthal*, Dkt. No. 76-6151, slip op. 3625, 3626 n. 1 (2d Cir., May 19, 1977), nevertheless, there still must be a jurisdictional statute which confers authority upon the Courts to review this matter or the action must be dismissed. *Califano v. Sanders*, 430 U.S. at 105-06; *Johnson v. Robinson*, 405 U.S. 361, 367-68 (1973). In this regard the only other bases for jurisdiction which Hsieh arguably could have alleged were 28 U.S.C. § 1331 or Section 279 of the Act. Her failure to refer to either of these sections, however, is not surprising because clearly neither supports her jurisdictional claims in this action.

1. 28 U.S.C. § 1331 did not confer subject-matter jurisdiction upon the District Court.

Assuming *arguendo* that Hsieh can comply with the amount in controversy requirement which 28 U.S.C. § 1331 ("Section 1331") contained at the time this action

was instituted,²⁷ it is still clear, despite the District Court's unsolicited²⁸ conclusion to the contrary, that Section 1331 will not support this action because the statutory history of that section as it relates to immigration claims demonstrates that Congress intended the enactment of Section 279 of the Act to foreclose the application of Section 1331 to immigration matters.

The immigration laws have contained their own provisions conferring jurisdiction on the federal courts, irrespective of the amount-in-controversy and independent of any other jurisdictional statute, since 1891. These special²⁹ jurisdictional statutes within the immigration laws manifested an awareness by Congress that aliens, like Hsieh and her children, with no absolute right to enter or remain in the United States could hardly be said to suffer a significant loss from their immigration problems

²⁷ On October 21, 1976 Congress amended Section 1331 to eliminate the requirement of a specified amount-in-controversy as a prerequisite to the maintenance of an action against an agency of the United States. See Pub. L. 94-574, 90 Stat. 2721 (October 21, 1976); *Califano v. Sanders*, *supra*. The legislative history to that amendment indicates, however, that this change was not intended to expand the jurisdictional scope of Section 1331 to include matters which had heretofore been the subject of separate and distinct jurisdictional statutes. H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 5, 9-11 (1976); S. Rep. No. 94-996 94th Cong., 2d Sess. 14 (1976).

²⁸ Although neither asserted as a basis for jurisdiction in the complaint nor discussed by the parties in any of their papers, the District Court concluded, *sua sponte*, that it had jurisdiction to review this action under Section 1331 because of the recent amendment to the amount-in-controversy requirement in that section. As we shall demonstrate, regardless of whether the amendment was intended to apply retroactively, *cf. Acosta v. Gaffney*, 558 F.2d 1153, 1156 (3d Cir. 1971), this conclusion was clear error.

²⁹ "Special" here refers to the absence of any jurisdictional amount requirement.

and thus would be unable to surmount any amount-in-controversy requirement.

Originally, these provisions provided for concurrent jurisdiction between the district and circuit courts. *See* Immigration Act of 1891, 26 Stat. 1086, and Immigration Act of 1907, 34 Stat. 907. However, in 1911, when Congress abolished the circuit courts, *see* Judicial Code of 1911, 36 Stat. 1167, it also, for the first time, included a special grant of jurisdiction over immigration cases within the general federal jurisdictional statute, the forerunner of 1331, *see* Judicial Code of 1911, § 24 (22), 36 Stat. 1091, 1093, apparently to avoid the possible interpretation that the abolition of the circuit courts implicitly abrogated the special grant of jurisdiction within the Immigration Act itself. *See* Notes to the 1907 Immigration Act, § 4277.

Despite the enactment of the Immigration Act of 1917, 39 Stat. 893, which included a new jurisdictional provision that contained no reference to the circuit courts, *see* Immigration Act of 1917, § 25, the immigration law provision remained in the general jurisdictional statute [28 U.S.C. § 41 (22) (1940 ed.)] until 1948. At that time this oversight was remedied and it was repealed,³⁰ leaving the special jurisdictional provision in the immigration laws as the only basis for jurisdiction in immigration cases. *See* Hart and Wechsler. "The Federal Courts and the Federal System" at 848 (2d Ed. 1973).

Since Congress' decision in 1948 to eliminate the jurisdictional provision for immigration matters from the general federal jurisdictional statute (Section 1331), its expression of jurisdiction within the immigration laws themselves has remained the *sole* source of subject-matter

³⁰ Act of June 25, 1948, Section 39, 62 Stat. 869, 992, 996.

jurisdiction for individuals seeking to assert immigration claims in the federal courts. Initially, Congress permitted judicial review in the district courts of all substantive claims arising under the immigration laws. See 8 U.S.C. § 164 (1940 ed.). However, in 1952 Congress altered the jurisdictional provisions within the Act so that the respective Courts of Appeals had exclusive jurisdiction to review all final orders of deportation entered against aliens within the United States, see Section 106(a) of the Act, 8 U.S.C. § 1105a(a), and the district courts retained jurisdiction to review only those claims emanating from exclusion proceedings, see Section 106(b) of the Act, 8 U.S.C. § 1105a(b), or arising under the substantive provisions of the second subchapter of the Act. See Section 279 of the Act, 8 U.S.C. § 1329.

Given the extensive jurisdictional scheme established by Congress within the Act and Congress' clear and longstanding intention to have the federal courts' jurisdictional basis in immigration matters emanate from specific jurisdictional provisions within the immigration laws themselves, the conclusion is apparent that Congress never intended Section 1331 to supplement Section 279 of the Act. Moreover, this result is also consistent with the conclusions reached by those courts faced with this question in other contexts which have generally concluded that specific grants of jurisdiction override the more general grant of jurisdiction contained in Section 1331. See *Califano v. Sanders*, *supra*; *Hall v. DuPont de Nemour*, 312 F. Supp. 358, 360 (1970) ("Section 4 of the Clayton Act contains a specific grant of jurisdiction to the federal courts over private actions arising under the federal antitrust laws. . . . The total pattern of federal jurisdiction statutes indicates that this particular provision, rather than the more general laws, controls actions based upon the antitrust laws. . . . This is true even as to cases where diversity or a federal question

exists in satisfaction of the more general jurisdictional requirements") (emphasis added); *Commonwealth of Puerto Rico v. Sea Land Service Inc. et al.*, 349 F. Supp. 964, 974 (D.P.R. 1970) ("each Section 1331 and 1337 excludes the other"); *American Amusement Co. v. Ludwig*, 82 F. Supp. 263, 267 (D.C. Minn. 1949) ("to conclude that 1331 is concurrent with 1337 would be unsound . . . the general rule must be applied here. Consequently, reading 1331, with 1337, as it must be, required the conclusion that 1337 prevails over and limits 1331."). Therefore, the District Court's assertion of jurisdiction under Section 1331 was clearly erroneous and should be modified.

2. Section 279 of the Act did not confer subject matter jurisdiction upon the District Court.

Hsieh's potential reliance on Section 279 of the Act, 8 U.S.C. § 1329,³¹ as a source for subject-matter jurisdiction in this action could only be based on two possible claims.³² First, Hsieh might contend that since the district courts have jurisdiction under Section 279 to review the rescission of an alien's status, these courts should also have jurisdiction under that statute to review all aspects of these proceedings, including the speed with which the Service responds to a consular inquiry suggesting that an alien's status should be rescinded. However, such a contention ignores not only the five year statute of limitations contained in Section 246(a) of the Act, 8 U.S.C. § 1256(a), but also the totally discretionary nature of the Service's decision whether to institute re-

³¹ Section 279 appears in the second subchapter of the Act provides:

The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter. (emphasis added).

³² The claims discussed in this section of the brief are naturally speculative because Section 279 of the Act has not been asserted as a basis for subject-matter jurisdiction in this action.

scission proceedings against a particular alien. *United States v. Santelises, supra*; *United States ex rel. Masucci v. Follette, supra*. Consequently, it clearly will not support subject-matter jurisdiction over this action under any jurisdictional statute, including Section 279.

Of course, Hsieh might contend that the Consul's request was not intended to force the Service to decide whether rescission proceedings should be instituted against her in a time period less than the five year period authorized by Congress, *see* Section 246(a) of the Act, 8 U.S.C. § 1256(a); *Zaoutis v. Kiley, supra*, but rather that the Consul's request was an attempt to get the Service's assistance with its investigation into whether the children's applications for immigrant visas should be approved. However, since the statutory authority under the Act for the visa issuance process is Section 104, 8 U.S.C. § 1104, a provision within the *first* subchapter of the Act, the conclusion is inescapable that Congress deliberately drafted Section 279 of the Act to reflect the judicial decisions finding the consular visa issuing process immune from judicial scrutiny, *United States ex rel. London v. Phelps*, 22 F.2d 288 (2d Cir. 1927), *cert. denied*, 276 U.S. 630 (1930); *United States ex rel. Ulrich v. Kellogg*, 30 F.2d 984 (D.C. Cir.), *cert. denied*, 279 U.S. 868 (1929), and that the District Court lacked subject-matter jurisdiction to review any claims arising with respect to that process. *Gomez v. Kissinger, supra*; *Pena v. Kissinger, supra*. As this Court stated in *Gomez v. Kissinger*, in a *per-curiam* opinion:

"We . . . conclude that the decisions of the Supreme Court in *Klindienst v. Mandel*, 408 U.S. 753 (1972), . . . and of this court in *Burrafato v. United States Department of State*, 523 F.2d 554 (2d Cir. 1975), *cert. denied*, 424 U.S. 910 (1976) . . . , preclude any judicial review of the consular decision not to issue a visa in this case. We reject

the argument that Section 279 authorizes the sort of judicial interference in the visa issuing process sought by the plaintiff." *Gomez v. Kissinger*, *supra* at 519. See also *Bedoya v. INS*, 410 F.2d 343 (9th Cir. 1969).

CONCLUSION

The District Court's conclusion to dismiss this action should be affirmed but its determination that the Service had an enforceable duty to respond to a consular inquiry should be modified.

Dated: New York, New York
November 23, 1977

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for Defendant-Appellee.*

ROBERT S. GROBAN, JR.,
Special Assistant United States Attorney,
PATRICK H. BARTH,
*Assistant United States Attorney,
Of Counsel.*

AFFIDAVIT OF MAILING

State of New York) ss
County of New York)

Robert S. Groban, Jr. being duly sworn,
deposes and says that he is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies
he served/~~an~~ copy of the
within Appellee's Brief

by placing the same in a properly postpaid franked envelope addressed:

David C. Buxbaum, Esquire
11 Broadway
Suite 1612
New York, New York

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

23rd day of November, 19 77

Pauline P. Gora

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978